



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT KISUMU**

**CRIMINAL CASE NO. 44 OF 2011**

**BETWEEN**

**REPUBLIC.....PROSECUTION**

**AND**

**GEORGE OWUOR ODEGO.....1<sup>ST</sup> ACCUSED**

**MICHAEL ODOYO AJODE.....2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. The accused, **GEORGE OWUOR ODEGO (DW 1)** and **MICHAEL ODOYO AJODE (DW 2)**, were jointly charged with the murder of **ENOCK OCHIENG KUBI** (“the deceased”) contrary to **section 203** as read with **section 204** of the *Penal Code*. According to the information, the incident took place on 20<sup>th</sup> July 2011 at Alungo South Sub-location, Kisumu West District of then Nyanza Province. They denied the offence and the trial proceeded apace with the prosecution calling 7 witnesses and the accused giving sworn testimony in their defence.

2. In a murder trial the prosecution bears the onus of proving the case against the accused beyond reasonable doubt. The prosecution must prove that the deceased died; that the accused before the court is the person who unlawfully caused that death and that the accused caused that death with malice aforethought.

3. The fact and cause of death was not in dispute. Dr Nelly Wanjala (PW 4) produced the post-mortem report prepared by Dr Muchela who performed the post-mortem on the deceased’s body on 25<sup>th</sup> July 2011 at Jaramogi Odinga Oginga Teaching and Referral Hospital (“JOOTRH”). The key observations were that there was a 5cm long stab wound on the back which had been sutured. The 6<sup>th</sup> and 7<sup>th</sup> left ribs were fractured leaving blood clots in the intercostal muscles. The left lower lobe was severely crushed leaving a litre of blood in the chest. The left side of the face was swollen. Dr Muchela concluded that the cause of death was respiratory failure due to acute lung injury and haemothorax due to a penetrating injury to the lung.

4. The prosecution case was that on the night of 20<sup>th</sup> July 2011, the deceased together with Michael Odhiambo Kubi (PW 1), James Odhiambo (PW 2) and Kevin Okoth (PW 3) had gone out to fish in Lake Victoria. At about 10.00pm, they saw a boat approaching them. The people on the boat flashed torches towards them. DW 1, who was on that boat, confronted the deceased about unauthorised fishing and when he denied the accusation, DW 1 stabbed him with a spear while DW 2 hit him with a stick. PW 1, PW 2

and PW 3 were pushed off the boat. Thereafter, the accused and their accomplices left on their boat and were arrested the following morning.

5. The evidence against the accused was as follows. PW 1 testified that he saw 7 people on the boat and three of them were shining torches at them. He saw DW 1 pulling out a spear with which he stabbed the deceased on the left side of his body. He then pulled it out and stabbed the deceased a second time while DW 2 hit him on the forehead with a *rungu*. Other people came onto the boat and pushed PW1 into the water but he managed to hold on to the boat.

6. PW 2 recalled that as they were fishing, he saw a boat with 7 people approaching them. They had torches and questioned them as to why they were fishing in the wrong place. DW 1 stated that they were looking for the deceased. One of the people came from the other boat and pushed PW 1 into the water but he managed to hold onto the boat. PW2 testified that as the deceased was asking why they were assaulting PW 1, DW 1, who was standing on the other boat, stood up and speared the deceased on the right side of the chest, withdrew the spear and stabbed him again at the back. He also recalled seeing DW 2 hit the deceased with a wooden rod on his face after he had been stabbed.

7. PW 3 testified that he saw a boat with 7 people with 3 torches flashing approaching them. PW 3 told the court that the boat came close by and DW 1 flashed his torch at the deceased and said that he was looking for the deceased. As he shone the torch on the deceased's face, the deceased raised his arm at which point DW 1 pierced him on the left side of the chest. As the deceased was asking why DW 1 was killing him, DW 2 jumped onto their boat and pushed him into the water. In cross-examination, PW 3 stated that DW 2 hit the deceased with a *rungu* after he had been stabbed. By that time, PW 1 was already in the water. When the assailants left, PW 1, PW 2 and PW 3, who were in the water, climbed back onto the boat where the deceased lay dead. They decided to go back to the beach to report the incident.

8. The incident was reported to the Beach Management Unit (BMU) Chairman, George Ochieng Okello (PW 5) who recalled that on the material day, he was woken up at 11.45p.m. by his sister in-law accompanied by PW 1 and PW 3. PW 1 narrated to him what had taken place and stated that DW 1 had stabbed the deceased. Since the deceased had been brought to the beach, PW5 went there and found him on the boat. He noticed a stab wound injury on the back left side. After administration police officers from Bodi Administration Police Post arrived at the scene, he assisted in taking the deceased's body to JOOTRH. PW 5 further testified that on 4<sup>th</sup> August 2011, a spear was found in a boat at the beach which PW 1 identified as the one that was used to stab the deceased. PW 5 handed it over to the police.

9. Corporal Gordon Aram (PW 7) of Bodi Administration Police Post received information that a fisherman had been killed by his colleagues. He went to Asat Beach at about 12.30 a.m. where he found the deceased lying in a boat. He had an injury on the left side of the chest and had bled profusely. After interviewing the people present, PW7 was told that DW 1, DW 2 and other people who were in the boat had attacked the boat carrying the deceased and his friends. On the same night, PW7 was able to arrest several suspects including DW 1 and took them to Kombewa Police Station. He did not arrest DW 2 on that night but was arrested later.

10. After the close of the prosecution case, the accused denied the offence and elected to give sworn statements in their defence. DW 1 testified that he was the Chairman of Kagwel Beach Management Unit and also the patrol chairman. On the material day, as they were patrolling the breeding zone with 6 other agents, he saw people in a boat throwing a net over their boat. They proceeded to where the boat was and upon reaching it, he ordered them to surrender their nets. He recalled that there were 4 people on that boat and that he recognised the deceased, who was their leader. He testified that the deceased was standing up and responded that he could not surrender the nets since the last time he did, he was reported to the Fisheries Department. The deceased then went to the back of the boat and came back with a *panga*. DW 1 pleaded with him not to fight and to give up the nets, but the deceased ignored his pleas. DW 1 explained that he lifted a small item and threatened the deceased and told him not try what he what he was going to do. DW 1 further explained that the boat started swaying from side to side while the accused started raising the object in his hand at which point he saw the deceased fall on a small object that injured him. DW 1 told his team that they should leave since he did not want to be involved in a fight and they all left.

11. DW 2 denied that he was on the boat on the night of 20<sup>th</sup> July 2011 as he was at home. He testified that on the following day, he heard that some people had gone on patrol at Asat beach and the deceased had been killed. He also testified that he was involved in a dispute over land with PW 7 and was arrested because he had exchanged words with him and was initially charged with creating a disturbance.

12. Since the fact and cause of death of the deceased is not in dispute, the question for consideration is whether the accused unlawfully killed the deceased and if so, whether they acted with malice aforethought. The testimonies of PW 1, PW 2 and PW 3 were clear that DW 1 is the one who confronted the deceased about illegal fishing and stabbed him. The fact that that the accused stabbed the deceased with a sharp object was corroborated by the stab wound injury and the findings on the cause of death established by the post-mortem of the deceased. Following the incident, PW 1 and PW 3 immediately went to inform PW 5 who was the nearest person in authority. They named DW 1 as the person who stabbed the deceased. DW 1 admitted that he was at the *locus in quo*. He accepted that there was a confrontation between him and the deceased over the fact that the deceased and his friends were fishing in a prohibited breeding zone. He also stated that he was holding an object but was cagey about disclosing the nature of instrument he was holding. In the written submissions, counsel for DW 1 submitted that, “*the spear held by DW 1 occasioned the death of the deceased.*” I find that the sum total of evidence, was that DW 1 confronted the deceased about fishing in a prohibited zone and after an exchange, DW 1 took a spear and stabbed him, thereby causing his death. I therefore find and hold that DW 1 is the person who stabbed the deceased.

13. I now turn to consider whether the prosecution proved malice aforethought. Counsel for DW 1 submitted that the prosecution failed to establish malice aforethought. He contended that the accused had no intention of causing the deceased’s death as they were merely enforcing the existing beach guidelines when he went to where the deceased and his friends were fishing. Counsel also submitted that the prosecution did not prove that DW 1 had any motive to injure the deceased and that any statements attributed to him that he was looking for the deceased ought to be viewed in the context of the fact that the deceased’s brother, PW 1, confirmed that he did not know of any bad blood between the accused and deceased.

14. Counsel further submitted that the testimonies of PW 1, PW 2 and PW 3 were contradictory as to where the deceased was stabbed and how many times he was stabbed. Finally, the weapon that was produced in evidence as the murder weapon was in doubt as PW 3 testified that the spear was not the one that was used to stab the deceased.

15. Malice aforethought is the *mens rea* for the offence of murder. The Court of Appeal in ***Nzuki v Republic [1993] KLR 171***, stated that malice aforethought is a term of art and emphasized that:

*Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused: -*

*i. The intention to cause death;*

*ii. The intention to cause grievous bodily harm;*

*iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.*

*It does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused’s conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (see *Hyman v Director of Public Prosecutions [1975] AC 55*)*

16. In most instances, the intention is established by or inferred from the surrounding circumstances. In **Nzuki v Republic (Supra)**, the Court of Appeal further observed that:

*No doubt, if the prosecution prove an act the natural consequence of which should be a certain result and no evidence or explanation is given, then the Court may, on a proper direction, find that the accused is guilty of doing the act with the necessary intent, but if on the totality of evidence there is room for more than one view as to the intent of the accused, the Court should direct itself that it is for the prosecution to prove the necessary intent to its satisfaction, and if, on a review of the whole evidence, it either thinks that that intent did not exist or it is left in doubt in respect thereof, the accused should be given the benefit of that doubt. Thus, where on a charge of murder the evidence does not exclude the reasonable possibility that an accused person killed the deceased by an unlawful act but without the intent necessary to constitute legal malice requisite to the proof of that offence, that killing would only amount to manslaughter. See *Rex v Steane*, [1947] 1 KB 997; and *Sharmal Singh s/o Pritam Singh v R* [1960] EA 762. [Emphasis mine]*

17. It is thus the duty of the court to consider the entire evidence and consider whether the prosecution has established malice aforethought beyond reasonable doubt. Factors such as the part of the body that was targeted, the type of weapon used, if any, and the type of injuries inflicted upon the deceased are considered (see ***Rex v Tubere s/o Ochen* [1945] 12 EACA 63**).

18. PW 1 and PW 2 testified that the deceased was stabbed twice while PW 3 stated that DW 1 stabbed the deceased three times. The evidence from the post-mortem report is that the deceased suffered a single stab wound inflicted by a sharp object hence I reject the testimony of PW 1, PW 2 and PW 3 that the deceased was stabbed multiple times. The available evidence does not point to a discernible motive for DW 1 to have killed the deceased apart from the fact that the deceased and his friends were fishing in prohibited waters and a confrontation ensued.

19. One issue that has caused me anxiety is that the prosecution did not call any witness from the other boat to give evidence nor did it explain why it failed to do so yet PW 7 testified that he arrested the other people who were involved in the incident. The only evidence is from the deceased's friends. Was there a fight between the two groups? Did the deceased and his friends act in such a way that DW 1 would have apprehended danger? I am guided by the decision in ***Nzuki v Republic (Supra)*** and I have doubt that the prosecution proved malice aforethought beyond reasonable doubt. I therefore find that the prosecution has only proved the offence of manslaughter against DW 1.

20. As regards DW 2, he was accused of having acted in concert with DW 1. DW2 denied being present at the scene. However, PW 1 PW 2 and PW 3 positively identified him together with DW 1. The evidence against him is that he was present at the scene, that he jumped on the deceased's boat, and only hit the deceased on the face after the deceased had stabbed him. The blow did not cause the deceased's death and in the circumstances, I therefore acquit **MICHAEL ODOYO AJODE** of the death of **ENOCK OCHIENG KUBI**. He is set free unless otherwise lawfully held.

21. Consequently, I find the 1<sup>st</sup> accused, **GEORGE OWUOR ODEGO** guilty of manslaughter for the unlawful killing of **ENOCK OCHIENG KUBI** contrary to **section 202** of the **Penal Code** and I convict him accordingly.

**DATED and DELIVERED at KISUMU this 28<sup>th</sup> day of September 2017.**

**D.S. MAJANJA**

**JUDGE**

Mr Mwesigwa, Advocate for the 1<sup>st</sup> accused.

Mr Amule, Advocates for the 2<sup>nd</sup> accused.

Ms Osoro, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions, for the State.